

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JUSTIN WEBB</b>	)	
Claimant	)	
V.	)	
	)	CS-00-0159-681
<b>SANTA FE TOW SERVICE, INC.</b>	)	AP-00-0451-395
Respondent	)	
AND	)	
	)	
<b>AMERICAN INTERSTATE INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the May 28, 2020, Order entered by Administrative Law Judge (ALJ) Troy A. Larson.

**APPEARANCES**

Joani Harshman appeared for Claimant. Timothy Lutz appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Motion to Dismiss Hearing held May 26, 2020, and the documents of record filed with the Division.

**ISSUES**

The ALJ dismissed Claimant's claim at the request of Respondent pursuant to K.S.A. 2015 Supp. 44-523(f)(1). The ALJ found Claimant filed his Motion to Extend with the Division on May 26, 2020, almost two months beyond the three year limitation set out in K.S.A. 44-523(f)(1). As a result, the claim must be dismissed for lack of prosecution. The ALJ indicated Claimant preserved his argument regarding the issue of the constitutionality of K.S.A. 2015 Supp. 44-523(f)(1) and whether Claimant's due process is violated if his claim is dismissed. These issues may be addressed by a court of competent jurisdiction as this Court does not possess authority to rule on constitutionality issues.

Claimant argues K.S.A. 2015 Supp. 44-523(f)(1) deprives him of procedural and substantive due process opportunity for a full and complete hearing and to be heard in a meaningful and timely manner. Claimant is not at maximum medical improvement and has been incarcerated for the majority of the three year limitation to get his claim to regular hearing or settled.

Respondent argues the Order should be affirmed. Respondent contends Claimant's attorney had ample time to file a motion to extend and failed to do so, therefore the Board has no choice but to affirm the ALJ's dismissal.

### **FINDINGS OF FACT**

Claimant was injured on February 5, 2015, when he slipped and fell to the ground shattering his pelvis and left wrist, breaking his left leg, and injuring his left shoulder.

On March 27, 2017, Claimant filed his Application for Hearing.

Claimant was incarcerated on August 10, 2017, and was sentenced to 37 years in prison.

On March 30, 2020, Respondent filed an Application for Dismissal.

Claimant filed a Motion to Extend under K.S.A. 44-523(f) on May 25, 2020.

A Motion hearing was held on May 26, 2020.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2015 Supp. 44-523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

Claimant's Application for Hearing was filed on March 27, 2017. Claimant's Motion to Extend the three year time limit was not filed until May 25, 2020, more than three years after the application for hearing was filed.

Claimant argues he is not at maximum medical improvement and has been incarcerated since August 2017. Such circumstances could very well constitute good cause to extend the three year time limitation.

However, the Kansas Supreme Court in the case of *Glaze v. J.K. Williams*<sup>1</sup> ruled a motion to extend the three year limitation for good cause under K.S.A. 2015 Supp. 44-523(f)(1) must be filed before the three year limitation expires or the claim shall be dismissed.

As the Kansas Court of Appeals stated in the same case *Glaze v. J.K. Williams*,<sup>2</sup> "the statute provides Glaze a sufficient opportunity to proceed with his claim if he does so under the time requirements of the statute."

Claimant had the same opportunity as did Glaze. He could have filed a motion to extend prior to expiration of the three year limitation, but did not do so. The ALJ's Order dismissing this claim is affirmed.

Claimant raises constitutional due process arguments. The Board lacks the authority to rule on constitutionality issues. Those issues are reserved for a court of competent jurisdiction.

### **CONCLUSIONS**

After reviewing the record compiled to date, the Board concludes the Order to Dismiss should be affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Troy A. Larson dated May 28, 2020, is affirmed.

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<sup>1</sup> *Glaze v. J.K. Williams LLC*, 309 Kan. 562, 439 P.3d 920 (2019).

<sup>2</sup> *Glaze v. J.K. Williams LLC*, 53 Kan. App. 2d 712, 720, 390 P.3d 116 (2017).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2020.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Via OSCAR

Joani Harshman, Attorney for Claimant  
Timothy Lutz, Attorney for Respondent and its Insurance Carrier  
Hon. Troy A. Larson, Administrative Law Judge